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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PATRICK ANTHONY VANDERLINDEN, Defendant and Appellant.	D074082 (Super. Ct. No. SCN361958)

APPEAL from a judgment of the Superior Court of San Diego County, Richard R. Monroy, Judge. Affirmed and remanded with directions.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, A. Natasha Cortina, Kelley Johnson and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Patrick Anthony Vanderlinden of inflicting corporal injury on his spouse, A.E. (Pen. Code,[1] § 273.5, subd. (a).) The court placed him on three years formal probation and ordered him to serve 365 days in local custody. It imposed an $820 fine among other fees and fines. Vanderlinden contends: (1) the prosecutor committed misconduct in closing arguments and (2) the court did not provide a sufficient basis for imposing the $820 fine. We agree with the second contention and therefore affirm the judgment and remand with directions set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

A.E.'s First Account of the Incident

A registered nurse testified that in June 2016, she attended A.E. at a hospital's emergency room. A.E. was upset and crying, and her eye and face were injured. A.E. underwent a CT scan to check for orbital bone fractures and bleeding on her brain. A.E. told the nurse that Vanderlinden, not for the first time, had hit her. A.E. also told a triage nurse that Vanderlinden had injured her. One nurse told A.E. that the law required the nurse to notify police about the incident. A.E. became upset and worried for her children.

The nurse informed a San Diego deputy sheriff that A.E. had been involved in a domestic violence incident that day. When the deputy met A.E. at the hospital shortly afterwards, she was emotional, fearful, and panicking. Although A.E. was nervous and initially reluctant to speak with the deputy, she eventually told him that Vanderlinden had

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1 Undesignated statutory references are to the Penal Code.

hit her several times on the right cheek. The deputy photographed A.E.'s extensive injuries to her bruised right cheek and her extremely swollen right eye. A.E. did not have any defensive wounds on her hands. A.E.'s mother encouraged A.E. to talk to the deputy, saying, "This is not okay what happened. You need to tell them what happened." A.E.'s mother told the deputy that A.E. and Vanderlinden had been involved in previous domestic violence incidents.

A San Diego Sheriff's detective testified that in investigating the incident, he called A.E. and her mother several times but A.E. never responded. When A.E.'s mother eventually responded, she said Vanderlinden had threatened to kill A.E., the children and possibly himself if A.E. continued speaking and cooperating with police. A.E.'s mother also told the detective that Vanderlinden, in separate incidents, had thrown a pair of scissors at A.E.'s head, and threatened A.E. with a bat. A.E.'s mother gave the detective photographs that the mother had taken over the past two years, showing A.E.'s domestic violence injuries. She also gave the deputy copies of A.E.'s text messages, including one in which A.E. said of Vanderlinden, "This POS is going to kill me and the kids."[2] A.E.'s mother later stopped communicating with the detective, telling him she feared Vanderlinden would retaliate by injuring his children.

A.E.'s and Her Mother's Changed Accounts at Trial

A.E. testified that she had been drinking on the day of the incident. That evening, she and Vanderlinden argued, which was not uncommon. However, he never hit her then

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2 When asked at trial, A.E. said "POS" means piece of shit.

or at any other time. Rather, A.E. claimed she injured herself by tripping in her home, sliding, and hitting her cheek on the sharp corner of a cabinet. A.E. claimed not to remember sending the text message about Vanderlinden threatening to kill her and the children. She denied that Vanderlinden had repeatedly punched her in the face. A.E. said she had told her mother, the nurses and the police that she had injured herself in a fall, and she denied telling them otherwise.

A.E.'s mother testified that while she initially assumed Vanderlinden had hit A.E. on the day of the incident, she later changed her opinion. She came to believe A.E.'s drinking problem had caused A.E. to exaggerate some things about the incident.

Medical Testimony

Dr. Tomaneng, an emergency room doctor, examined photographs of A.E.'s injuries and concluded they were caused by blunt trauma and were consistent with multiple strikes to the face. He thought it unlikely A.E.'s injuries were caused by her falling on a sharp corner of a wooden object. The prosecutor's office paid Dr. Tomaneng a fee of almost $1,000 for his consultation and time spent testifying at trial.

DISCUSSION

I.

Claim of Prosecutorial Misconduct

Vanderlinden contends "[t]he prosecutor both referred to facts not in evidence and vouched for his own narrative in the closing argument by telling the jury that 'unfortunately,' 'domestic victims come into court and they're untruthful.' " Vanderlinden adds that the prosecutor erroneously referred to the People's " 'burden' to do 'due

diligence' by discrediting [A.E.]. The court validated this improper argument by overruling the defense's objection." (Emphasis and some capitalization omitted.)

A. *Background*

During the People's closing argument, this exchange occurred:

"[Prosecutor:] And we heard from the [emergency room] physician, Dr. Tomaneng. He's been an [emergency room] physician for 17 years, dealt a lot with trauma. He doesn't know the victim or the parties, and that was intentional. I just wanted his objective perspective as a medical doctor of looking at these photographs without knowing anything about what was going on. . . . He concluded those injuries were consistent with blunt force trauma, repeated strikes to the face. Man, where have we heard that before? We heard that June 12th, 2016. And who did we hear that from? The victim. What did [Dr. Tomaneng] tell us it's not consistent with? A fall on a sharp corner. . . . When people fall, you're going to usually see injuries to the forehead, to chins, to nose, to arms, to legs. [A.E.] had no other injuries. [¶] I expect [defense counsel] will get up here and tell you, [']well, the District Attorney's Office or the government—the District Attorney's Office paid [Dr. Tomaneng] all this money to come in and make this opinion.['] Yeah, we did. We compensated him. I told you in the beginning of this trial that the burden in this case to prove it beyond a reasonable doubt is right here, with me. And it is. And unfortunately, when domestic violence comes in, domestic victims come into court and they're untruthful, and they—

"[Defense counsel:] Objection. Improper.

"The Court: Overruled.

"[Prosecutor:] —and they tell different stories, then that burden on me is to do my due diligence to you to answer the questions for you and prove the case beyond a reasonable doubt. So when she came in here and told you she fell on a plywood corner, despite how common sense tells us that's not reasonable when we look at those injuries, it's my job to go drag an emergency room doctor from a nearby hospital in here, who probably has better things to do treating patients, so that he can explain to you medically how that's not reasonable and medically that's not consistent with what her face looked like. And as everyone on this jury is probably aware of, doctors are expensive. So yes, he was compensated. I would much prefer not to ever have to call this witness, but I wasn't given that choice."

B. *Applicable Law*

"As a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

A prosecutor should not vouch for the strength of the prosecution's case based on matters outside the record. (*People v. Hill* (1998) 17 Cal.4th 800, 823, 829, 832; *People v. Huggins* (2006) 38 Cal.4th 175, 206-207.) " 'Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide.' " (*People v. Smith* (2003) 30 Cal.4th 581, 617.) "The prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence, to comment on failure to produce logical

evidence, [and] to argue on the basis of inference from the evidence that a defense is fabricated . . . ." (*People v. Pinholster* (1992) 1 Cal.4th 865, 948.)

A prosecutor's intemperate behavior violates the federal constitution when it comprises a pattern of conduct so egregious that it infects the entire trial with such unfairness as to make the conviction a denial of due process. (*People v. Samayoa*, *supra*, 15 Cal.4th 795, 841.) " 'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.)

"A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.) " 'In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner.' " (*People v. Valdez* (2004) 32 Cal.4th 73, 132-133.) We examine the prosecutor's statements in the context of the entire argument and the instructions given to the jury. (See *People v. Morales* (2001) 25 Cal.4th 34, 44-46.) We do not lightly infer that the jury drew the most, rather than the least, damaging meaning from the prosecutor's statements. (*People v. Shazier* (2014) 60 Cal.4th 109, 144; *People v. Dykes* (2009) 46 Cal.4th 731, 771-772.)

C. *Analysis*

Although Vanderlinden objected to a portion of the challenged comments as "improper," he did not object on grounds of prosecutorial misconduct or that the prosecutor had referred to facts not in evidence, or vouched for the strength of the People's case by relying on the prosecutor's experience. Further, Vanderlinden failed to request that the court admonish the jury, and we have no basis for concluding that such an admonishment would have been futile. This claim is thus forfeited on appeal. However, even if it was properly preserved, there was no misconduct.

We conclude the prosecutor did not commit reversible error because it is not reasonably probable that the jury would have reached a result more favorable to Vanderlinden absent those statements. The prosecutor simply sought to preempt the defense's argument by explaining to the jury why the People had elected to pay a medical doctor to testify. The prosecutor explained that if A.E. had not changed her version of the incident at trial, the prosecution would not have needed Dr. Tomaneng's testimony. The prosecutor cast doubt on A.E.'s testimony about falling on the wooden cabinet and argued the doctor's testimony countered it. These arguments were a fair comment on the testimony. Specifically, as stated, A.E. initially told her mother, the nurses and police Vanderlinden had hit her, injuring her face; however, at trial she testified she fell. The jury was able to gauge her credibility. Further, Dr. Tomaneng had testified A.E.'s story about a fall was not consistent with her injuries. The prosecutor properly pointed out the inconsistencies in A.E.'s accounts.

Moreover, this case did not turn on whatever negative inference the jury may have drawn from the prosecutor's fleeting reference to domestic violence victims being untruthful. Rather, the evidence supporting Vanderlinden's conviction was overwhelming. Specifically, A.E. had sent a text message saying he would kill her and the children. On the day of the incident, she did not tell her mother, the nurses, or the deputy that she received her injuries from a fall. Her mother had taken several photos of A.E. that documented her previous injuries that Vanderlinden had inflicted. Based on that abundant evidence, the jury would likely have convicted Vanderlinden even absent the prosecutor's challenged statements.

Finally, we are not persuaded by Vanderlinden's argument that in the prosecutor's closing arguments, "[A.E.] was presented to the jury as just one more instance of the sort of lying 'domestic victim' with whom the prosecutor had to operate as part of his job." Vanderlinden maintains "[t]his was an unfair argument, since the prosecutor was neither an expert nor a witness, and was instead invoking the credibility of the state to prop up the prosecution's own arguments." To any extent the jury even considered the prosecutor's passing reference to domestic violence victims, on this record, it could only relate it to A.E.'s experience, as the prosecutor did not elaborate on any other domestic violence victim. We conclude the prosecutor did not develop any argument regarding his expertise outside of the record to support his argument. In any event, the court instructed the jurors that the statements of counsel are not evidence, and that they were solely to determine the credibility of witnesses. Therefore, based on the prosecutor's entire argument and the jury instructions, we do not infer that the jurors interpreted the

prosecutor's argument in the most damaging light. (*People v. Dykes, supra,* 46 Cal.4th at pp. 771-772.)

II.

Vanderlinden challenges the imposition of the $820 fine, alleging the court failed to specify a statutory basis for it. The People contend Vanderlinden forfeited the claim by not raising it in the trial court and, in any event, the fine was properly imposed under section 1465.7, subdivision (a).

"Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment." (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.) In a case, as here, that did not involve an abstract of judgment, the court adopted that reasoning to probation minute orders: "[A]lthough no abstract of judgment was issued, section 1213 required the trial court to furnish the executive officer with a commitment document (probation minute order) bearing the 'form and content' required for an abstract, as expounded by this court in *People v. High, supra,* 119 Cal.App.4th at page 1200." (*People v. Eddards* (2008) 162 Cal.App.4th 712, 718.)

At sentencing, the record shows the court imposed the $820 fine as set forth in paragraph 2, subdivision (a) of the order granting felony probation as follows: "Fine of $820 including surcharge and penalty assessment [§] 1465.7(a))." Section 1465.7 subdivision (a) states, "A state surcharge of 20 percent shall be levied on the base fine used to calculate the state penalty assessment as specified in subdivision (a) of Section 1464." In turn, section 1464 subdivision (a) states that subject to certain statutory

exceptions, "there shall be levied a state penalty in the amount of ten dollars ($10) for every ten dollars ($10) or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed or collected by the courts for all criminal offenses, including all offenses, except parking offenses . . . ."

Here, the probation minute order does not specify what base fine the court used to calculate the $820 fine. We therefore remand the matter to the trial court for the limited purpose of having it clarify that matter.

DISPOSITION

We affirm the judgment. We remand for the trial court to specify in a new minute order the basis for imposing the $820 fine.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.